85-1531

Supreme Court, U.S.
FILED
FEB 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

MARCUS GUMZ,

Petitioner,

v.

DOUGLAS MORRISSETTE & LAWRENCE CLOUTIER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in holding that there was no violation of constitutional magnitude of rights secured by the Fourteenth Amendment where (1) state officials maliciously planned and caused the use of excessive force in executing an arrest, (2) state officials orchestrated a needlessly dramatic and coercive draconian operation which utilized too many bodies and too many guns and which was grossly disproportionate to the need to secure payment of a $100 civil penalty and to terminate further civil violations, (3) state officials knew that the operation would surprise, frighten, upset and anger the person arrested, and (4) the operation caused the person arrested to suffer emotional distress at the time and in the immediate aftermath deter-

mined by a jury to merit $50,000 in compensatory damages and $15,000 in medical expenses, the court having determined that the injury suffered was not sufficiently "severe" as a matter of law.

2. Did the court below err in holding that the intentional seizure of petitioner's two ton dragline from his farm by state officials, which sezure was not authorized by state statute or other law, did not constitute a deprivation of property without due process of law in light of Hudson v. Palmer, 468 U.S. ___, 104 S. Ct. 3194, 82 L. Ed.2d 393 (1984), where the operation to seize the property required substantial equipment and manpower and was planned in advance and cleared in advance by the highest authority of the state agency whose officers seized the property.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The caption of the case in this court contains the names of all parties.

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REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Seventh Circuit below is Gumz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was rendered on September 5, 1985. A Petition for Rehearing in the Court of Appeals was filed on September 18, 1985, and was

denied on September 27, 1985. On December 26, 1985, Mr. Justice Stevens signed an order extending the time for filing this petition for certiorari to and including February 24, 1986. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment, United States Constitution:

> Sec. 1. ...Nor shall any State deprive any person of life, liberty, or property, without due process of law....

United States Code, 42 U.S.C. §1983:

> Every person who, under color of any

> statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE

Petitioner Marcus Gumz is a "muck farmer" who lives near Baraboo, WI. He raises mint and other crops on land that would revert to ponds and marshes if drainage is not maintained. The maintenance of drainage systems, including a main drainage ditch known as a leech waterway, requires removal of run-off or "muck". Gumz utilized a "dragline" which is a two-ton apparatus consisting of a steam shovel and a 50-foot boom to scoop muck out of the waterway. The Wisconsin Dept. of

Natural Resources, (DNR), considers the leech waterway a navigable body subject to its regulation.

On October 28, 1980, a DNR warden issued a citation to an employee of Marcus Gumz, Groehler, who operated the dragline for dredging the leech waterway without a permit in violation of Wis. Stat. §30.20 (1979). The DNR warden, Warden Jameson, later issued a citation and mailed it by certified mail to Gumz. Gumz never received the citation. The certified letter was returned undelivered. Jameson and the district attorney of Sauk County knew that Gumz had not received the citation by certified mail. The district attorney's office issued an arrest warrant and complaint dated February 19, 1981, against Gumz for failure to answer the October 28, 1980, citation in court.

On and before March 3, 1981, plans

were formulated to enter on Marcus Gumz's property and execute the arrest warrant and seize Gumz's dragline. Among those involved in the planning were the respondents to this petition, Douglas Morrissette and Lawrence Cloutier. Morrissette was a district director for the DNR and Cloutier's superior. Cloutier was a "warden supervisor". Eight DNR wardens, a DNR warden supervisor, Cloutier, a DNR district director, Morrissette, a DNR equipment operator, and a sheriff's deputy were involved in the execution of the arrest warrant and seizure of the dragline. Arrangements were made to obtain the use of a lowboy trailer upon which to haul the dragline. A permit for using an oversized trailer was obtained. The dragline was to be confiscated because of the violations that it had been involved with and as evidence.

Respondent Morrissette prior to March 3 made arrangements with and notified the DNR central office, including George Meyer, DNR's Law Enforcement Bureau Director, and the Secretary of the Dept. of Natural Resources, Mr. Besnady, of the proposed operation.

The citation for dredging without a permit sought a forfeiture of $100.

The force of eleven DNR personnel were all armed with pistols. Some were armed with shotguns, a 30.06 scoped rifle, and a mini-14 semi-automatic rifle.

On March 3, 1981, prior to executing the plan, district director Morrissette telephoned an Assistant Attorney General, Maryanne Sumiy, and informed her of the situation and the DNR's proposed course of action.

Despite previous disagreements between Gumz and DNR employees, no incidents prior to March 3, 1981, provoked

physical violence from Gumz or threats of physical violence.

Initially four men went on the Gumz property in two cars. District Director Morrissette and a warden went to the house to serve the warrant. Gumz did not answer the door. Warden supervisor Cloutier and another warden who was armed with a scoped rifle went to the dragline down by the ditch and arrested two of Gumz's employees.

When Gumz first saw armed men on his land, he became frightened and commenced a series of telephone calls to the newspaper, the Governor's office, the sheriff, DNR headquarters, and his attorney.

Gumz exited his house, and drove to where the vehicle in which district director Morrissette had arrived was located and ordered it off his farm. Allegedly Gumz was informed of the

warrant. An accident then ensued between Gumz's car and the DNR car. The DNR car blocked a single lane farmroad at a turn-around place. Gumz did not deliberately hit the DNR car. Gumz, frightened that the DNR agents would shoot him, backed his car into a field and around the DNR car and back toward his house to try to get back inside. Respondent Cloutier called six DNR reserves onto the Gumz property. They entered the property at high speeds and after a brief chase blocked the path of Gumz auto without contacting plaintiff or his vehicle. The DNR vehicles moved around Gumz's yard all at once, circling and blockading Gumz's car.

Gumz then left his car, put his hands up, and said, "Don't shoot me", as six wardens, all with weapons, converged on him. He was arrested, handcuffed,

patted down, and put in a DNR car. The dragline was seized and removed from the Gumz property.

Gumz was taken to the Sauk County Sheriff's Office where he was charged with violating the dredging law and with a felony charge of criminal damage to property. He posted $443 in bail and was released.

During his custody Gumz became ill. Almost immediately after his release he was hospitalized for an emergency operation to implant a pacemaker, which he subsequently underwent.

Plaintiff filed this action on January 24, 1983, in the United States District Court for the Western District of Wisconsin. The action brought arose inter alia under 42 U.S.C. §1983, and the trial court had jurisdiction of the action under 28 U.S.C. §§1331 and 1343.

United States District Court Judge,

James E. Doyle, granted defendants' motions to dismiss all of Gumz's claims asserted under sections of the civil rights act other than §1983 in an order dated August 3, 1984. Gumz did not appeal from that order. In that order, Judge Doyle also ruled that plaintiff's complaint did not adequately allege a violation of the Fourth Amendment so as to state a claim under §1983. Judge Doyle rejected Gumz's argument that the warrant for his arrest was invalid because it was issued by a court commissioner rather than a judge in violation of state law. Gumz had argued that the DNR officials who obtained the warrant knew that Gumz had not received the dredging citation but did not inform the court commissioner of this fact. Had they done so Gumz argued that under Wisconsin law only a judge could issue a warrant. This issue of misrepresen-

tation by the DNR officials who applied for the warrant, was not appealed to the Court of Appeals.

Also prior to trial all of Gumz's pendant state tort law claims for assault and battery, false arrest, false imprisonment, intentional and negligent infliction of mental distress, abuse of process and negligence were dismissed because of failure to comply with the Wisconsin statute requiring notice of claim to the state. Gumz did not appeal from this ruling of Judge Doyle.

The jury returned a verdict in favor of Marcus Gumz against defendants Morrissette and Cloutier finding that they had caused "the use of excessive force in the arrest of plaintiff on March 3, 1981". The jury also found that Cloutier had maliciously caused the use of such force. The jury found that Cloutier maliciously seized the dragline

on March 3 and that Morrissette seized the dragline without a good faith belief that it was constitutional to do so. The jury also found that by causing the seizure Cloutier caused Gumz to suffer emotional distress on 3/3/81 and in the immediate aftermath.

The jury awarded $50,000 in compensatory damages and medical expenses of $15,000 against both defendants. The jury awarded $10,000 in punitive damages against defendant Cloutier. The jury specifically refused to find that the use of force caused Gumz to suffer either a "heart problem" or a "persisting change in personality". Therefore, the jury's damage awards were solely for "emotional distress on March 3, 1981, and in the immediate aftermath".

The defendants filed post verdict motions. All of defendants' post verdict motions were denied by Judge

Doyle. Judge Doyle ruled that the sum of $10,000 was clearly not excessive as a punitive measure for malicious violation of a constitutional right. (App. p. 29). Judge Doyle also refused to modify or reduce the award of $50,000 in compensatory damages for emotional distress. (App. p. 29-30) Although he stated that the amount was "questionable" he concluded the following:

> However, there was considerable evidence from which the jury could reasonably have found that for this particular plaintiff, the emotional distress, even though brief, was unusually intense and severe.

(App. p. 29) Judge Doyle also upheld the sufficiency of the evidence for the jury to conclude that Cloutier acted with malice. (App. p. 30)

The Court of Appeals reversed the trial court's judgment with respect to the excessive force claim and directed the trial court to enter judgment for

the defendants on that claim. The Court of Appeals also affirmed the district court's judgment to the extent that it did not allow compensation to the plaintiff under §1983 for the seizure of the dragline. (App. p. 16) In an opinion written by Chief Judge Cummings and joined in by Judge Eugene A. Wright, the court recognized Gumz's claim for excessive use of force as a substantive due process claim. The court adopted the following standard:

> ...[T]he use of force by a state officer is unconstitutional if it 1) caused severe injuries, 2) was grossly disproportionate to the need for action under the circumstances, and 3) was inspired by malice rather than merely careless or unwise excess of zeal so it amounted to an abuse of official power that shocks the conscience.

(App. p. 9) The court concluded that it would not be proper to reverse the district court's judgment on the basis of either the second or third criterion

of its three-part test. (App. p. 10) With respect to the issues of disproportionality and malice, the court found as follows:

> Since there is sufficient evidence to support the jury's finding that Cloutier maliciously caused the use of excessive force, and in view of the fact that the draconian operation of March 3, 1981, was orchestrated to secure payment of a $100 civil penalty and terminate further civil violations, it would not be proper for this Court to reverse the district court's judgment on the basis of either the second or third criterion of the three-part test.

(App. p. 9-10) With respect to the issue of severity of the injuries caused the court concluded, however, the following:

> A review of the court's holdings and the jury's findings with respect to the injuries sustained by Gumz as a result of the March 3 incident, however, forces us to conclude that this case does not involve the type of severe harm redressible under §1983.

(App. p. 10)

The Court of Appeals also stated the

following with respect to this case:

> The situation before us viewed in its worse [sic] light can be summarized as follows:
>
> Two state officials implemented an operation to enforce a civil statute that utilized too many bodies and too many guns and those officials maliciously planned the needlessly dramatic and coercive operation knowing it would surprise, frighten, upset and anger the plaintiff.

(App. p. 10)

The Court of Appeals considered the demonstration of manpower and firepower as grossly excessive. The court stated "Thus the only force involved here was the grossly excessive demonstration of manpower and firepower." (App. p. 11) The court also concluded that the only harm done was emotional distress. The court stated:

> The only resulting injury or harm was the understandable emotional distress suffered by the unsuspecting and unwary target of the display.

(App. p. 11) The court concluded the

following:

> Although defendants here must have known that their operation would upset and anger the plaintiff, the facts of this case as determined by the judge and jury do not implicate the type of "brutal and demeaning" attack on the psyche of Marcus Gumz which would be actionable under §1983. [fn omitted]

(App. p. 12)

With respect to Gumz's claim that he should obtain compensatory damages for the emotional distress caused by seizure of the dragline, the Court of Appeals decided to affirm the district court's refusal to allow Gumz compensation for the seizure under §1983 "since under Hudson v. Palmer, 468 U.S. ___, 104 S. Ct. 3194, 82 L.Ed. [sic] 393, it is clear that the seizure was not a deprivation of property without due process of law." (App. p. 13)

The Court of Appeals determined that the deprivation of property in this case involved a special kind of taking by the

state, expressly considered by the Supreme Court in Parratt v. Taylor, 451 U.S. 527, where the loss of property "is occasioned by a random, unauthorized act by a state employee, rather than by an established state procedure. Hudson, 468 U.S. at ___, 104 S.Ct. at 3203, 82 L.Ed. [sic] at 406. (App. p. 15). The Court also stated the following:

> In such circumstances, where the state cannot predict or realistically prevent the deprivation of property, Parratt ruled that the Fourteenth Amendment is not violated if the state provides a meaningful post-deprivation remedy.

(App. p. 15)

Gumz petitioned the panel of the Court of Appeals for rehearing. He challenged the Court of Appeals' statement "It is also clear that the deprivation was the result of a random and unauthorized act of a state official." (App. p. 15) He asserted that the hauling away of the dragline was not a "random and

unauthorized act". He brought to the panel's attention numerous evidence from the record demonstrating that prior planning for the intentional seizure was both necessary and engaged in. He also set forth portions of the record demonstrating that the Wisconsin attorney general's office, the DNR central office, and the DNR Secretary Besnady were notified of the operation to seize the dragline in advance of its seizure. He asserted that Parratt and Hudson were not controlling because, in the present case, it would not have been difficult or burdensome for the state officials involved to include pre-deprivation processing prior to any seizure of the dragline. He also asserted that the taking here was not random and unauthorized but was planned and pre-arranged. Marcus Gumz's petition for rehearing was denied on September 27, 1985.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Seventh Circuit in this case is in conflict with the decision of the Court of Appeals for the Second Circuit in Conway v. Village of Mount Kisco, 750 F.2d 205 (1984) (Conway I) and the second ruling in the same case, 758 F.2d 46 (1985) (Conway II). This Court has granted a petition for writ of certiorari to review both of the Conway decisions. Cerbone v. Conway, No. 84-1947, Cert. granted, January 27, 1986. 54 U.S.L.W. 3492. At issue in the Conway cases is the sufficiency of allegations of malicious prosecution to state a cause of action under 42 U.S.C. §1983 based on violation of the Due Process Clause of the Fourteenth Amendment. In Conway II the Second Circuit asserted that the claim was of constitutional magnitude because it

alleges "great humiliation, ridicule, and mental anguish". Conway II, supra, 758 F.2d at 48. Nothing of the facts in the Conway case as revealed in the two Court of Appeals opinions demonstrates that any physical injury was suffered by the plaintiff in that action. Nonetheless the Second Circuit recognized Conway's claim as one of constitutional magnitude on an implicit theory of violation of substantive due process.

The Court of Appeals for the Seventh Circuit in this case, however, has required as an essential element of a substantive due process claim proof of severe injury. Although the Court of Appeals in its opinion states that it is not holding "that some type of bodily injury is an absolute requirement to §1983 liability based on an excessive force claim," (App. p. 12), the court stated the following:

> Where the undue force underlying an excessive force claim primarily consists of an abstract demonstration of force and not its actual use, a justified finding of liability under §1983 would be most unusual.

(App. p. 11)

In applying its standards to the facts in this case, the Seventh Circuit held that emotional distress injury, in the absence of physical injuries, absent extraordinary circumstances is insufficient to constitute a constitutional violation as a matter of law. This holding is in direct conflict with the Second Circuit's response in Conway to the defendant's argument that the deprivation Conway alleged lacks constitutional magnitude. The Second Circuit stated the following:

> The point is weak. Conway's complaint alleges that seven hours of detention and "great humiliation, ridicule, and mental anguish" resulted from Cerbone's conspiracy with the Village, Bano Buick, and the Martabonos to execute the arrest

> warrant. Complaint at §§14-15. Those allegations are quite sufficient to constitute a constitutional deprivation of liberty actionable under §1983.

Conway II, supra, 758 F.2d at 48.

This court included among the questions presented for review in granting the petition for certiorari in the Conway cases the following question:

> Did court below err in holding that malicious prosecution claim is of constitutional magnitude because it alleges "great humiliation, ridicule, and mental anguish" and arrest under warrant that court elsewhere held time-barred, contrary to Paul v. Davis, 424 U.S. 693 (1976)? 54 U.S.L.W. 3493.

It should also be noted that the second question presented for review in this case is related to the third question presented for review in Conway. Both this case and the Conway case present issues of the interpretation of the applicability of Hudson v. Palmer under circumstances where assertions are made that the acts

complained of were random, unauthorized, and tortious under state law. In Conway, the petitioners ask this Court to reverse the Court of Appeals for failure to apply Hudson v. Palmer and related cases as a grounds for dismissing the claim. In this case petitioner seeks review of an asserted over extension and misinterpretation of the scope of Hudson v. Palmer by the Seventh Circuit.

Because this case has been tried and the facts have been more conclusively determined, in contrast to the Conway case which arises in the context of the Second Circuit reversing the trial court's motion to dismiss Conway's complaint, consideration of this case by the United States Supreme Court will provide the court with a more firm basis upon which to develop the contours of substantive due process claims.

This court, subsequent to the decision of the Court of Appeals in this case, has reiterated the substantive aspect of the Due Process Clause. In Daniels v. Williams, ___ U.S. ___, 54 U.S.L.W. 4090 (Jan. 21, 1986) in the opinion of the court by Mr. Justice Rehnquist this court explained the scope of the Fourteenth Amendment's Due Process Clause as follows:

> By requiring the Government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g. Rochin, supra, it serves to prevent governmental power from being "used for purposes of oppression." [citation omitted]

Id, 54 U.S.L.W. at 4091. Similarly, in his concurring opinion, Mr. Justice Stevens stated the following:

> Second, it contains a substantive component, sometimes referred to as "substantive due process," which

> bars certain arbitrary government action "regardless of the fairness of the procedures used to implement them."

Id, 54 U.S.L.W. at 4093. See also Davidson v. Cannon, ___ U.S. ___, 54 U.S.L.W. 4095, 4096 (Jan. 21, 1986) where the court noted that the defendants were "far from abusing governmental power, or employing it as an instrument of oppression" in reaching the court's conclusion that the negligent failure of prison officials to protect Davidson from another inmate did not deprive Davidson of a protected interest. In that case this court stated the following:

> Petitioner's claim, based on respondent's negligence, is quite different from one involving injuries caused by an unjustified attack by prison guards themselves, see Johnson v. Glick, 481 F.2d 1028 (CA 2), (Friendly, J.) cert. denied sub. nom., John v. Johnson, 414 U.S. 1033 (1973), or by another prisoner where officials simply stood by and permitted the attack to proceed, see Curtis v. Everette, 489

> F.2d 516 (CA 3 1973), cert. denied sub. nom., Smith v. Curtis, 416 U.S. 995 (1974).

Id., 54 U.S.L.W. at 4096. Similarly, the dissenting opinion of Justices Blackmun and Marshall in Davidson includes the following:

> A deprivation must contain some element of abuse of governmental power, for the "touchdown of due process is protection of the individual against arbitrary action of government, Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

Id., 54 U.S.L.W. at 4097.

This court's holding in Davidson demonstrates that seriousness of injury is not the issue which is central to determination of whether a violation of the Due Process Clause has occurred. The central consideration is whether or not there has been an abuse of governmental power or governmental power has been employed as an instrument of oppression.

The Court of Appeals for the Seventh

Circuit in this case decided a federal question, that is the scope of the protection of the Due Process Clause of the Fourteenth Amendment, in a way in conflict with the applicable decisions of this Court (see Rule 17.1(c) of the United States Supreme Court). The Court of Appeals recognized that the state officials engaged in conduct which might properly be described as "abusive government conduct". The court recognized facts that can only be interpreted as demonstrating that the governmental officials employed their power as an instrument of oppression. The court found that the action taken against Marcus Gumz was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal when it expressly ruled that the second and third criteria

of the three-part test it established were met. The court, however, treated as a separate and distinct requirement proof of severe injury. By elevating the requirement of "severe injury" from the status of being only one factor to be considered in determining whether there has been an abuse of governmental power or government power has been employed as an instrument of oppression, to the status of a sina qua nom requirement for determining that the Due Process Clause has been violated, the Court of Appeals decided this case in conflict with this court's opinion in Davidson.

Furthermore, in addition to the conflict with the decision of the Second Circuit in Conway, the decision of the Court of Appeals in this case is in conflict with decisions of the courts of appeals of other circuits with respect

to the adoption of standards to be applied to the evaluation of substantive due process claims. Although the Court of Appeals for the Seventh Circuit in its opinion claims that it is adopting the same standard as that utilized by three of the Court's sister Circuits, the standard in fact adopted by the Seventh Circuit differs materially from the standards of the Tenth, Fifth and Fourth Circuits. Thus in its opinion the Seventh Circuit stated the following:

> According to this standard the use of force by a state officer is unconstitutional if it 1) caused severe injuries, 2) was grossly disproportionate to the need for action under the circumstances, and 3) was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience.

(App. p. 9). The Court treated the three matters as separate criteria each of which must be satisfied in order to

prevail. The other circuit courts have treated the issues of severity of injury, disproportionality, and presence or absence of malice as factors which should be weighed together to determine whether or not a constitutional violation has occurred. The courts have not treated the three matters in isolation from each other. The consequence of the more stringent standard adopted by the Seventh Circuit is to deny constitutional protection under circumstances where the government's official conduct is grossly disproportionate and inspired by malice, and therefore abusive government conduct, employed as an instrument of oppression, solely because the court determines that the injury, although substantial, is not sufficiently severe.

In none of the three cases cited by the Court of Appeals in support of its

assertion that three sister circuits have adopted the same standard was a determination made that failure to prove that the injury resulting from government conduct was sufficiently severe, taken by itself, meant that no denial of Due Process of Law had occurred.

In Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980), the Court of Appeals for the Fourth Circuit reversed the decision of the trial court dismissing the substantive due process claims of a child and her parents alleging violation of the child's constitutional rights by the infliction of disciplinary corporal punishment. The court stated:

> For reasons that follow we conclude that there may be circumstances under which specific corporal punishment administered by state school officials gives rise to an independent federal cause of action to vindicate substantive due process rights under 42 U.S.C. §1983.

Id. at p. 611. The court remanded the

case for further proceedings because the court could not determine whether those circumstances existed in the instant case from a review of the pleadings. There were no specific detailed factual allegations for the court to review. Because the complaint alleged that the corporal punishment inflicted was not "reasonable", but "severe" (Id. at 610), the court's holding is not based in any way on any preceived inadequacy of proof of severity of injuries.

Given the procedural posture of the Hall case, the portions of the opinion dealing with the standard to be applied in determining whether corporal punishment under certain circumstances constitutes a violation of substantive due process rights is dictum not holding.

The court in Hall stated the following:

> As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force supplied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

Id. at 613. Nothing in the opinion states or implies that each of the issues of severity of injury, disproportionality, and maliciousness must rise to a certain level before a finding of denial of liberty without due process of law can be made. In fact the opinion points to no aspect of the complaint alleging facts related to disproportionality of the punishment to the need presented. Nonetheless, the court reversed the dismissal of the complaint.

It should also be noted that the ruling of the Fourth Circuit in Hall was stated in terms of inquiry into school

corporal punishment cases. The concept of "liberty" in the context of compelled attendance at public school with the specially recognized need for discipline of students is substantially different from the concept of "liberty" in the context of freedom from the abuse of official power in the privacy of one's own property.

In Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981), the Court of Appeals for the Fifth Circuit reversed a trial court ruling that the blows inflicted by a police officer lacked the brutal force necessary to engender a constitutional deprivation. The Fifth Circuit found that the policeman's actions did constitute a legal violation of constitutional dimension. Id. at 265. The court stated the following:

> In determining whether the state officer has crossed the constitutional line that would make the

> physical abuse actionable under §1983, we must inquire into the amount of force used in relationship to the need presented, the extent of the injury inflicted and the motives of the state officer. If the state officer's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excessive zeal so that it amounted to an abuse of official power that shocks the conscience, it should be redressed under §1983.

Id. at 265. Again, nothing in the Shillingford opinion indicates that the matters of severity of injury, disproportionality, and maliciousness are to be separately determined. The approach is to give consideration to each of these matters in attempting to reach a conclusion of whether or not there was an abuse of official power that shocks the conscience.

The court in Shillingford reversed the trial court and determined that the physical abuse in the case was

sufficiently severe. Reaching its conclusion the court noted the following:

> That the results of the attack on Shillingford's person were not crippling was merely fortuitous.

Id. at p. 266. Because Shillingford found there was a constitutional violation, its holding is of little value in determining the issue of whether or not there is a constitutional violation when the injury inflicted is less severe.

Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981) also does not hold that lack of proof of severe injuries, by itself, without consideration of any of the other factors, requires as a matter of law a determination that no constitutional violation of substantive due process rights has occurred. In Wise the court held that Wise had not even effectively demonstrated a simple common

law claim for assault, to say nothing of a claim of excessive force. Id. at 1335. Wise did not even file affidavits or make specific reference to testimony or other evidence to support his claim that he was assaulted by Bravo. Id. at 1333 n. 2.

The Court of Appeals in this case decided an important question of federal law which has not been, but should be, settled by this Court. The significance of the questions presented and the need for their resolution is reflected in this court's grant of the petition for certiorari in the Conway case, supra. Also a petition for a writ of certiorari is pending before this court in Sampson v. Gilmere, No. 85-1186. The petition is to review the ruling in Gilmere v. City of Atlanta, 774 F.2d 1495 (1985). Among the questions presented is the following:

> Does the use of deadly force by police officer acting in mistaken belief that suspect poses threat of serious physical harm, as matter of law, violate substantive due process rights and state federally cognizable claim pursuant to 42 U.S.C. §1983 regardless of procedural protections available under state law?

54 U.S.L.W. 3520. The petition was filed on January 10, 1986.

In Gilmere, supra, the en banc Eleventh Circuit Court of Appeals stated the following:

> In holding both officers liable for beating the decedent, the court found that the beating occurred "with little or no provocation" and that "the blows were not delivered in a good faith effort to control Patillo, but rather out of irritation at his initial resistance.... If supported by the record, these findings would suffice to make out a substantive due process violation under both Johnson and Rochin.

Id. at 1501. Subsequent acts by the officers resulted in Gilmere's death. Nothing in the opinion in Gilmere discloses what the extent of the

injuries were to Gilmere from the blows administered to him, as opposed to the damage resulting from the subsequent shooting of him.

In its opinion in this case the Court of Appeals stated the following:

> Plaintiff cites and this Court can discover no case allowing recovery for use of excessive force under §1983 where there was an absence of any kind of bodily or physical injury resulting from the use of force.

App. p. 11. The statement of facts in Davis v. Murphy, 559 F.2d 1098 (7th Cir. 1977), indicates that one of the plaintiffs in that case, Joyce Wesley, was lined against the wall with another of the plaintiffs with a cocked gun in their faces. One of the defendants, Dennis Murphy, a City of Milwaukee policeman, ripped out the entire front of Joyce Wesley's dress, partially bearing her breasts because he wanted to see their size. The facts recited

indicate no physical injuries to Joyce Wesley. Id. at 1100-1101. The Court of Appeals reversed the trial court and ruled that "plaintiffs have alleged and proved gross violations of the Bill of Rights as assimilated into the Fourteenth Amendment and of the procedural due process pregnant of the Fourteenth Amendment itself [citation omitted]...." Id. at 1102. Although the precise theories of the Seventh Circuit in Davis are not absolutely clear, the basis for the court's ruling was the use of excessive force by police officers in effecting an arrest.

This case is very different from the case of Baker v. McCollan, 433 U.S. 137 (1979) cited by the Court of Appeals. This is a case of preplanned, intentional official action. It is not a case of failure by governmental officials to institute adequate

procedures. Unlike Baker, there is no issue of causation. In Baker the prolonged detention at issue was caused by the police official's failure to institute adequate identification procedures. Id. at p. 142. In any event, this court in Baker assumed, arguendo, that "depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty ... without due process of law.'" Id. at 145. Thus, this court understood the determination of a constitutional violation to depend in part on the duration and circumstances of the detention, rather than on any consideration of seriousness of injury to the person.

In Baker, this court stated the following:

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.

Id. at 146. This does not mean, however, that conduct that constitutes a tort cannot also lead to liability for violation of rights protected by the Constitution. In Wilson v. Garcia, ___ U.S. ___, ___ 105 S. Ct. 1938, 1949, 85 L.Ed.2d 254 (1985) this court stated the following:

> Congress ... intended that the remedy provided in §1983 be independently enforcible whether or not it duplicates a parallel state remedy.

See also Gilmere v. City of Atlanta, GA, supra, 774 F.2d at 1498-1499.

Despite the lack of any serious injury to the person, Mr. Justice Blackmun, concurring, in Baker, supra, stated the following:

I do not understand the Court's

> opinion to speak to the possibility that Rochin might be applied to this type of case or otherwise to foreclose the possibility that a prisoner in respondent's predicament might prove a due process violation by a sheriff who deliberately and repeatedly refused to check the identity of a complaining prisoner against readily available mug shots and fingerprints. Such conduct would be far more "shocking" than anything that petitioner has done.

Id. at 148. Certainly the Baker case does not stand for the proposition that proof of serious injury to the person is required in order to prevail on a claim of denial of substantive due process rights.

The Court of Appeals in this case extended this Court's holding in Hudson v. Palmer, supra, and by doing so decided an important question of federal law which has not been, but should be, settled by this Court. In this case the Court of Appeals determined that the general rule of this court that "absent an 'extraordinary situation' a party

cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified" was not applicable to the facts in this case. The Court ruled that the deprivation of property in this case involves a special kind of taking by the state where the loss of property is "occasioned by a random, unauthorized act by a state employee, rather than by established state procedure." (App. p. 14-15). The Court cited Hudson, supra, as authority for its position. In this case, however, the deprivation of the two-ton dragline took place, and only could take place, after prior and extensive planning and preparation. Furthermore, the highest officials of the state agency and the state attorney general were informed in advance of the plan which included the seizure of the property. Despite the

fact that it is undisputed that the seizure was unauthorized by state law, the state agency determined that the procedure of seizure of the dragline was within the proper scope of the state's power. The Court of Appeals in this case extended Hudson to circumstances that Hudson was not designed to reach. The Court extended Hudson to acts which can not justifiably be characterized as unauthorized. It also extended Hudson to circumstances where a pre-deprivation procedure could have been and would have been effective. Because of prior planning for the seizure with notice to the highest levels of the state government, a pre-deprivation hearing and other procedural protections could have been afforded prior to the seizure. No emergency existed. If such deprivations of property are to be excluded from the scope of the protection of the Four-

teenth Amendment such an important question of federal law should be settled by the United States Supreme Court.

Furthermore, the seizure in this case occurred on the private property of Marcus Gumz. This case is in contrast to the circumstances in Hudson, supra, and in contrast to Parratt v. Taylor, 451 U.S. 527 (1981) where the seizures at issue were from persons who were prisoners and in accordance with this court's ruling in Parratt did not have a reasonable expectation of privacy enabling them to invoke the protections of the Fourteenth Amendment.

The Court of Appeals also determined that it was satisfied that meaningful post deprivation remedies to redress the taking of his property were provided to Marcus Gumz. (App. p. 15). Gumz, however, sought in his civil rights

action damages not only for the loss of the monetary value of the dragline, but also for the emotional distress which the jury determined was caused by the malicious seizure of the dragline by a state official. Nothing in the Court of Appeals' opinion indicates that Gumz had a remedy under state law for the emotional distress caused by such a malicious seizure of his property by state officials. Certainly an action for return of the property or for its recovery or for its monetary value (conversion) or for trespass to his personal property will not provide a remedy for the harm suffered by Marcus Gumz. His action was not limited to seeking return of his dragline or monetary damages for the economic loss to him resulting from its seizure. Gumz sought damages for the emotional distress resulting from the seizure of

his dragline in violation of his constitutional right not to be deprived of his property by state officials without due process of law. The Court of Appeals failed to consider Marcus Gumz's claim with respect to seizure of the dragline in its context. The seizure, as determined by the Court of Appeals, was part of the draconian operation which was maliciously planned by officials and was needlessly dramatic and coercive. By determining that remedies under state law were adequate, the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

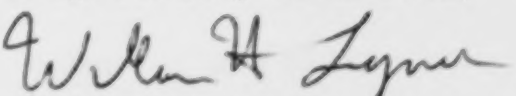
Marcus Gumz's petition for a writ of certiorari should be granted in order that this court may resolve the conflict of the decision of this case with

decisions of other federal courts of appeals and so that this Court may decide the important questions of federal law which are presented by this case which have not been, but should be, settled by this court.

APPENDIX

The opinion of the Court of Appeals for the Seventh Circuit and a portion of the opinion of the trial court denying defendants' motions for post conviction relief entered on November 26, 1984, are contained in an appendix to this petition which has been separately bound.

Respectfully submitted,



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February 24, 1986